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Realising the right of access to water for people living on farms: The impact of the KwaZulu-Natal High Court decision in *Mshengu v uMsunduzi Local Municipality*

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Summary: *Access to water is a constitutionally-protected right in South Africa and an energetic flow of laws, policies and programmes have been initiated to address historical inequalities in the supply of water since the dawn of democracy. Yet despite this, millions of people living in South Africa still have inadequate access to water. Access to water is a particular challenge for people living on farms. By providing an analysis of the case of Mshengu & Others v uMsunduzi Local Municipality & Others, decided by the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg, this article seeks to make two key contributions. First, it highlights the challenges experienced by farm dwellers in realising their right to water and locates these challenges within a legal framework which places obligations on both municipalities and private land owners*

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to provide access to water on farms. In particular, the mechanism of water services intermediaries envisaged in the Water Services Act 108 of 1997 is explored as a way to delineate and facilitate the role of private land owners in realising the right to water for farm dwellers. Second, drawing on debates around how the value of public interest litigation can be understood, the article interrogates the value of the litigation in the Mshengu case.

Key words: *right to water; water services intermediaries; farm workers; labour tenants; public interest litigation*

1 Introduction

Water is life. Without it, nothing organic grows. Human beings need water to drink, to cook, to wash and to grow our food. Without it, we will die.¹

South Africa's Constitution entrenches a right to water.² In the 24 years since the advent of democracy, an energetic flow of laws, policies and programmes have been initiated to address historical inequalities in the supply of water. Despite this, while the privileged (typically white) minority enjoy sufficient access to water, the majority of the population, including the poor, unemployed and marginalised (typically black) continue to struggle to access this basic and fundamental resource.³ Ensuring equitable and sufficient access to water thus remains one of the most crucial challenges in democratic South Africa.⁴

In 2019 the Minister of Water and Sanitation, Lindiwe Sisulu, conveyed that over three million people lacked access to basic water supply, while only 64 per cent of households have access to a reliable water supply.⁵ In May 2020, in a presentation by the Department of

1 *Mazibuko & Others v City of Johannesburg & Others* 2010 (3) BCLR 239 (CC) para 1.

2 Sec 27 of the Constitution of the Republic of South Africa, 1996 (Constitution).

3 H Thompson *Water law: A practical approach to resource management and the provision of services* (2005) 9, discussed in L Kotze 'Phiri, the plight of the poor and the perils of climate change: Time to rethink environmental and socio-economic rights in South Africa?' (2010) 1 *Journal of Human Rights and the Environment* 135 140.

4 B Schreiner & B van Koppen 'Policy and law for addressing poverty, race and gender in the water sector: The case of South Africa' (2003) 5 *Water Policy* 489; K Eales 'Water services in South Africa 1994-2009' in B Schreiner & R Hassan (eds) *Transforming water management in South Africa: Global issues in water policy* (2010) 33.

5 Speaking at the launch of the National Water and Sanitation Master Plan on 28 November 2019.

Water and Sanitation (DWS) concerning its response to COVID-19, DWS shared that 12 per cent of the population do not have access to even a basic water supply.⁶ Of great concern is the fact that the National Water and Sanitation Master Plan launched in November 2019 (discussed further below) reports that the current percentage of the population receiving reliable water services is lower than it was in 1994. While more homes in total now have water, as a percentage of all homes, fewer homes have water now than at the end of the apartheid era.⁷

While access to water is a systemic challenge in South Africa, this challenge is particularly acute for people living on farms. These include labour tenants, farm workers and their families, who in this article will be collectively referred to as farm dwellers. Many farm dwellers report deplorable living conditions, including insufficient access to an adequate water supply, sanitation facilities and refuse collection services.⁸ Their greatest struggle has been that farm owners claim that the provision of water is a municipal responsibility. Municipalities in turn argue that, even if they wished to, they have no jurisdiction to provide services on privately-owned land.⁹ In fact, land owners often refuse to consent to the state providing services on their land because they are afraid of making settlement on their land more permanent.¹⁰ Farm dwellers thus have been stuck between a rock and a hard place.

Farm dwellers include particularly vulnerable groups with the marginalisation of labour tenants dating back to their dispossession under the 1913 Native Land Act. In the words of the Constitutional Court:¹¹

6 'Covid-19: Water and sanitation intervention' Powerpoint presentation by DWS at a Water Research Commission webinar entitled 'Water and Sanitation – Learning and looking beyond the Covid-19 crisis' (26 May 2020).

7 S Kings 'Water services worse than in 1994' *Mail and Guardian* 31 January 2020, <https://mg.co.za/environment/2020-01-31-water-services-worse-than-in-1994/?fbclid=IwAR0S9A05mftHTGPAXS9JjHrrZZdYdGvm1j1f7Xpj8WBm3PkSgrJhll8UE> (accessed 9 June 2021).

8 Their struggles encompass attempts to improve the living conditions with respect to all of these issues. For the purposes of this article, the focus is on access to water.

9 Interview with Mondli Zondi, Research Assistant at AFRA, held on 3 April 2020 via Skype.

10 A Melsa et al 'Sanitation services for the informal settlements of Cape Town, South Africa' (2009) 248 *Desalination* 330-337.

11 *Mwelase v Director-General of the Department of Rural Development and Land Reform* 2019 (6) SA 597 (CC) (*Mwelase*) para 5. While the Land Reform (Labour Tenants) Act 3 of 1996 intended to reform this situation by acknowledging the precarious position of labour tenants and improving their security of tenure, this has largely not happened. In fact, the land reform process has been significantly undermined by 'administrative lethargy' in the Department of Rural Development and Land Reform which has meant that thousands of claims from labour tenants have not been processed. The situation became so bad

Labour tenancy has deep roots in our land's pernicious racial past. A labour tenant provides labour on a farm in exchange for the right to live there and work a portion of the farm for his or her own benefit. It is a precarious state, subject to the will of the land-owner. Historically it has been the more tenuous in South Africa because patterns of racial subordination and exclusion meant that labour tenants were overwhelmingly black, and the land owners on whose favour they depended were overwhelmingly white.

This article examines farm dwellers' access to water in uMgungundlovu District Municipality in KwaZulu-Natal. The Association for Rural Advancement (AFRA) has been working with farm dwellers in this area for many years. After a long journey of engaging with farm owners and several municipalities, AFRA and farm dwellers in the area, assisted by the Legal Resources Centre (LRC), approached the Pietermaritzburg High Court for relief.¹² The resulting judgment, *Mshengu & Others v uMsunduzi Local Municipality & Others*, decided by the High Court of South Africa, KwaZulu-Natal Division, Pietermaritzburg, has fundamentally changed the landscape of water services provision on farms in South Africa.

This article is organised into seven parts including this introduction. Part 2 outlines how water services are regulated in South Africa, while part 3 describes the factual background to the case and unpacks some of the key findings of the judgment. Part 4 critiques the Court's findings on the issue of the water services obligations born by local and district municipalities respectively. Part 5 examines the role that farm owners have to play in the provision of water on privately-owned land and interrogates the water services intermediary system established by the Water Services Act 108 of 1997 in this context. Part 6 discusses why the *Mshengu* litigation can be considered valuable, and part 7 provides some concluding remarks. The article has been compiled using desktop analysis of relevant legislation, policy, case law and secondary sources, as well as from information and perspectives provided by a few key informants in interviews conducted by the authors.

that the Land Claims Court eventually appointed a Special Master to assist the Department, an order that in 2019 was upheld by the Constitutional Court in *Mwelase*.

12 Further information about AFRA and LRC can be found at <https://afra.co.za/> and <https://lrc.org.za/> respectively (accessed 9 June 2021).

2 Regulation of water services provision in South Africa

Section 27(1)(b) of the Constitution provides that 'everyone has the right to have access to sufficient water', while section 27(2) obliges the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of this right. Section 27 expressly stipulates that the right is enjoyed by 'everyone' and thus can be claimed regardless of nationality, race, gender or ability.¹³

Two key pieces of legislation are designed to give effect to the constitutional right to water in South Africa, namely, the National Water Act 36 of 1998 (NWA) and the Water Services Act 108 of 1997 (Services Act). The NWA provides the legal framework for water resource management. As a complement to the NWA, the Services Act facilitates water services delivery. Section 3 of the Services Act confirms a right of access to basic water supply and provides for the establishment of several water services institutions, including water services authorities, water services providers and water services intermediaries.¹⁴ The Services Act is supported by the provisions of the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) which governs the provision of water services at the local government level and reinforces the emphasis on equitable access.¹⁵

As with all rights in the South African Bill of Rights, the state must respect, protect, promote and fulfil the right to water.¹⁶ This places both positive and negative duties on the state. The negative duty, deriving from the state's duty to respect the right to water, translates as an obligation to refrain from interfering with any existing right of access to water, such as by arbitrarily cutting off water supplies.¹⁷

13 Kotze (n 3) 148 where this and other characteristics of the right to water are discussed.

14 M Kidd (ed) *Environmental law* (2011) 82.

15 Sec 4(2)(j) Systems Act.

16 In terms of sec 7(2) of the Constitution. Sec 8(2) places similar obligations on individuals and the private sector (discussed further below).

17 In the case of *Manqele v Durban Transitional Metropolitan Council* 2001 JOL 8956 (D) the High Court found that the City Council had a right to disconnect the water supply of the applicant because she chose not to limit herself to the water supply provided to her free of charge. However, see J de Visser, E Cottle & J Mettler 'The free basic water supply policy: How effective is it in realising the right?' (2002) *ESR Review* 19 where the authors argue that this is 'constitutionally suspect' in view of the right to a basic level of water supply that exists notwithstanding the ability to pay. See also I Winkler 'Judicial enforcement of the human right to water: Case law from South Africa, Argentina and India' (2008) 11 *Law, Social Justice and Global Development* 2008 1. A less controversial decision was handed down a year later in *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) where the High Court held that the obligation to respect entails that the state may not take measures that result in the denial

The duty to protect the right to water encompasses an obligation on the state to take measures to protect vulnerable groups against violations of their rights by more powerful entities.¹⁸ This means that the government is obliged to prevent the discontinuation of water supply by a third party – so if, for example, a farmer unreasonably and arbitrarily cuts off access to water enjoyed by farm dwellers on his property, the state must restore such access.¹⁹

Regarding positive duties, as part of the mandate to promote and fulfil the right to water, the state must take pro-active legislative, administrative, budgetary and other steps to expand the number of people who have access to water, and to progressively improve what kind of access they have. These duties, however, are subject to a number of internal limitations.²⁰ First, the right is a right of access to water. Access implies two distinct but related obligations on the state. The state must ensure that all people have physical access to water. This means that the facilities that give access to water must be within safe physical reach for all sections of the population, including vulnerable and marginalised groups.²¹ In addition, the state must ensure that all people have economic access to water. This implies that the cost of accessing water should be set at a level that ensures

of access. For this reason disconnecting a pre-existing water supply was found to be a breach of sec 27(1). The Court noted that while the Services Act allows a water services provider to set conditions under which water supply may be discontinued, the procedure to discontinue must be fair, equitable, provide reasonable notice and an opportunity to make representations. Furthermore, where someone proves to the water services provider that they are unable to pay, their water services may not be disconnected. See the discussion of the case in A Kok & M Langford 'The right to water' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 200-204. See further M Kidd 'Not a drop to drink: Disconnection of water services for non-payment and the right of access to water' (2004) 20 *South African Journal on Human Rights* 119.

18 S Liebenberg 'South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty' (2002) 6 *Law, Democracy and Development* 163-164.

19 Kok & Langford (n 17) 204.

20 In addition, the right to water is also subject to the limitations clause set out in sec 36 of the Constitution. In terms of sec 36, rights in the Bill of Rights may be limited in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It requires taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and less restrictive means to achieve that purpose. See *Road Accident Fund v Mdeyide* 2011 (2) SA 26 (CC) para 62; *Minister of Justice and Constitutional Development v Prince* 2018 (6) SA 393 (CC) paras 59-60. See further K Iles 'A fresh look at limitations: Unpacking section 36' (2007) 23 *South African Journal on Human Rights* 68.

21 In November 2002 the United Nations Committee on Economic, Social and Cultural Rights issued General Comment 15 (29th Session, 2002, UN Doc E/C 12/2002/11) which provides guidance on issues such as proximity of the water supply, and the special attention that must be paid to vulnerable groups such as women and persons living with disabilities.

that all people are able to gain access to water without having to forgo access to other basic needs.²²

Second, it is a right of access to sufficient water. In 2001 the then Department of Water Affairs and Forestry (DWAF) introduced the Free Basic Water Policy together with a set of regulations that set the national minimum standard for basic water supply as follows:²³

A minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute, within 200 metres of a household; and with an effectiveness such that no consumer is without a supply for more than seven full days in any year.²⁴

Whether or not this amounts to 'sufficient' water has been the subject of much controversy, and since its inception the Free Basic Water Policy has been much critiqued.²⁵ One of the key platforms for this critique was the case of *Mazibuko v City of Johannesburg*²⁶ where the applicants argued that the free basic water allocation of 25 litres per person per day was unreasonable as it was insufficient to meet basic needs in the context of multi-dwelling households, extreme poverty and waterborne sanitation. Nevertheless, the Constitutional Court upheld the standard, finding the City of Johannesburg's policy to be reasonable.²⁷

22 De Visser et al (n 17) 18. Kok and Langford (n 17) argue that the use of 'access' implies that a state need not provide universal access to free water, but that where people can afford to pay for it, the state obligation is to ensure the conditions and opportunity for them to access water. General Comment 15 para 12.

23 On 8 September 2017 a new set of National Norms and Standards for Domestic Water and Sanitation Provision were published (GN 982 in GG 41100). Nevertheless, despite their promulgation, it seems that DWS does not view the 2017 National Norms and Standards as either finalised or binding (email correspondence in the authors' possession from DWS' Policy Directorate dated 13 May 2020).

24 Regulation 3(b) of the Regulations Relating to Compulsory National Standards and Measures to Conserve Water promulgated in terms of sec 9 of the Services Act.

25 See P Bond & J Dugard 'Water, human rights and social conflict: South African experiences' (2008) 1 *Law, Social Justice and Global Development* 8; Gleick has argued that the minimum standard should be 50 litres per person per day (P Gleick 'Basic water requirements for human activities: Meeting basic needs' (1996) 21 *Water International* 83). In General Comment 15 the ESCR Committee references Gleick's basic water requirement of 50 litres as being the basis for the quantity of water that should be 'available for each person' (para 12 with reference to fn 14); J Dugard 'The right to water in South Africa' in J Dugard et al *Socio-economic rights: Progressive realisation?* (2016) 317; L Mehta 'Do human rights make a difference to poor and vulnerable people? Accountability for the right to water in South Africa' in P Newell J Wheeler (eds) *Rights, resources and the politics of accountability* (2006) 13.

26 *Mazibuko* (n 1).

27 The Court found the City's policy to be reasonable on the basis that it had changed over time in response to the litigation in the sense that when the applicants first went to court, the policy provided a maximum of 6kl of free

Regulation 3(b) was also later enforced by the High Court in both *Nokotyana v Ekurhuleni Metropolitan Municipality*²⁸ and *Mtungwa v Ekurhuleni Municipality*.²⁹ In *Nokotyana* the Court ensured that Ekurhuleni Municipality agreed to provide communal taps to the residents of the Harry Gwala informal settlement in compliance with Regulation 3(b), while in *Mtungwa* the Court presided over a court-ordered settlement in which Ekurhuleni agreed to provide sufficient communal taps to the residents of Langaville informal settlement in order to satisfy Regulation 3(b). Essentially, these cases mean that where there are no existing water connections, the state is obliged to ensure access to the minimum regulated amount and, in the context of an informal settlement, these connections are typically provided in the form of communal taps installed at state expense.³⁰

The third internal limitation of the right to water is that the right need not be immediately secured but must be progressively realised within the available resources of the state. Progressive realisation implies that the state must both extend water services to those with none, and provide increasingly better levels of service to those with existing access. The Constitutional Court has established that when assessing whether a government policy or programme meets this standard, the test is one of reasonableness. In *Grootboom*,³¹ one of South Africa's landmark socio-economic rights cases, the Constitutional Court established that to be reasonable, government programmes must 'respond to the needs of the most desperate' and must ensure that social and economic rights are 'made more accessible not only to a larger number of people but to a wider range of people as time progresses'.³² Unfortunately, in *Mazibuko* the Constitutional Court adopted an interpretation of section 27(1)(b) that is qualified by section 27(2).³³ This means that neither section 27(1)(b) nor section 27(2) exists as stand-alone entitlements but rather that the content of the right of access to sufficient water is

water per household per month and, by the time the matter was heard in the Constitutional Court, the City had instituted a new policy in terms of which qualifying households could register for substantially more free water. For critiques of this judgment, see J Dugard 'Urban basic services: Rights, reality and resistance' in M Langford et al (eds) *Socio-economic rights in South Africa: Symbols or substance?* (2013) 275; J Dugard & M Langford 'Art or science: Synthesising lessons from public interest litigation and the dangers of legal determinism' (2011) 27 *South African Journal on Human Rights* 39.

28 *Nokotyana v Ekurhuleni Metropolitan Municipality*, unreported South Gauteng High Court Case 8/17815 (24 March 2009).

29 *Mtungwa v Ekurhuleni Municipality*, unreported South Gauteng High Court Case 34426/11 (6 December 2011).

30 Dugard (n 25) 11.

31 *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

32 *Grootboom* (n 31) paras 44-45.

33 *Mazibuko* (n 1) paras 46-68.

dependent on the reasonableness of the programmes or policies that the state adopts to give effect to the right.³⁴

Importantly, the right to water is also inseparable from a range of other human rights.³⁵ In particular, it is an enabling right for the enjoyment of rights such as dignity,³⁶ health,³⁷ food,³⁸ education³⁹ and safety,⁴⁰ and intersects closely with the environmental right.⁴¹ In addition, the application of the right to equality⁴² to water services provision means that no water-related programme or policy may unfairly discriminate against any group of historically-disadvantaged or currently-marginalised people. Because access to safe water within a reasonable distance is fundamental to realising women's sexual and reproductive health rights, as well as their right to be free from violence, the relationship between the right to water and the right to gender equality is also critically important.

The constitutional right to water thus forms part of a suite of justiciable socio-economic rights enshrined in the South African Bill of Rights which aim to achieve the Constitution's vision of a society characterised by equality, dignity and freedom. Although subject to a number of internal limitations, it is a right that places both positive and negative duties on the state and is closely related to a number of other rights in the Bill of Rights. The Constitution, the NWA, the Services Act and the Systems Act work together to place a duty on all spheres of government to collaboratively realise the right of access to water. The NWA provides that national government acts as custodian of the nation's water resources and, therefore, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner for the benefit of all persons.⁴³ In terms of the Services Act, the DWS is responsible for

34 M Langford et al 'Water' in S Woolman and M Bishop (eds) *Constitutional law of South Africa* (2013 Revision Service 5) 56B-1 56B-24 56B-25.

35 For a discussion on the interdependency of rights, see S Liebenberg 'The interpretation of socio-economic rights' in M Chaskalson et al (eds) *Constitutional law of South Africa* (2003) 33-1. See also 'Water supply and sanitation in South Africa: Environmental rights and municipal accountability' Lawyers for Human Rights publication series (1/2009) 2, https://cer.org.za/wp-content/uploads/2011/11/LHR-DBSA_Water_Report.pdf (accessed 9 June 2021).

36 Sec 10 Constitution.

37 Sec 27(1)(a) Constitution.

38 Sec 27(1)(b) Constitution.

39 Sec 29 Constitution.

40 Sec 12 Constitution.

41 Sec 24 Constitution.

42 Sec 9 Constitution.

43 Sec 3(1) NWA. The Preamble to the NWA outlines that national government bears overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use, the redistribution of water, and international water matters.

setting national policy frameworks and standards for the delivery of water services.

Currently, the DWS is facing a number of challenges. In November 2019 Minister Sisulu revealed a Master Plan that outlines a series of urgent steps to be taken in order to address systematic infrastructural challenges with the aim of securing uninterrupted water supply for both community and business use. It also sets out the critical priorities to be addressed by the water sector over the next 10 years. The Master Plan is estimated to cost R900 billion to implement over the next 10 years. However, Sisulu has inherited a dysfunctional department on the brink of bankruptcy, after widespread corruption had emptied out the departmental coffers.⁴⁴ This will make obtaining funds from National Treasury difficult. Nevertheless, Sisulu hopes to secure R565 billion of the R900 billion needed to implement the Master Plan from Treasury over the next decade. The remaining R335 billion will allegedly come from investments and the private sector.⁴⁵

However, while the DWS puts policy frameworks in place and sets standards for water services delivery, it is local government that is given the critical task of ensuring that water actually reaches people.⁴⁶ The Local Government: Municipal Structures Act 117 of 1998 (Structures Act) sets out a framework in which local government consists of metropolitan, district and local municipalities. Metropolitan municipalities are large urban agglomerations (such as the City of Johannesburg) and the rest of the country is divided into district municipalities, which are further divided into local municipalities. A district municipality thus is comprised of a number of local municipalities. In relation to service delivery, municipalities

44 See 'Water down the drain: Corruption in South Africa's water sector' report produced by the Water Integrity Network and CorruptionWatch (March 2020), https://www.corruptionwatch.org.za/wp-content/uploads/2020/03/water-report_2020-single-pages-Final.pdf (accessed 9 June 2021).

45 N Shange 'Lindiwe Sisulu unveils Master Plan to tackle water woes in South Africa' *Times Live* 28 November 2019, <https://www.timeslive.co.za/news/south-africa/2019-11-28-lindiwe-sisulu-unveils-master-plan-to-tackle-water-woes-in-sa/> (accessed 9 June 2021). The Plan has met with resistance from many in the ANC, as well as from fellow cabinet members, who claim that it was rushed through without adequate consultation. Sisulu refutes this, however, pointing to the fact that the Plan has been several years in the making under the auspices of three different ministers before her, during which time considerable consultation had taken place. It seems that Sisulu's motivation in releasing the Plan when she did may have been to ensure that it could receive a sizeable budgetary allocation in the next financial year which started in April 2020 (S Stone 'Lindiwe Sisulu faces backlash over R900 billion water master plan' *City Press* 9 December 2019, <https://citypress.news24.com/News/lindiwe-sisulu-faces-backlash-over-r900bn-water-master-plan-20191209> (accessed 9 June 2021)).

46 Part B to Schedule 4 of the Constitution, read with sec 156, confers executive authority on municipalities for the administration of water and sanitation services, limited to potable water supply systems, domestic waste water and sewage disposal systems. See further De Visser et al (n 17) 18.

are required to ensure the provision of services to communities in a sustainable manner and to promote social and economic development.⁴⁷ They must also structure and manage their administration, budgeting and planning processes to give priority to the basic needs of the community.⁴⁸ Further, municipalities must give members of the local community equitable access to the municipal services to which they are entitled,⁴⁹ and ensure that all members of the local community have access to at least the minimum level of basic municipal services.⁵⁰

The Services Act distinguishes between governance functions performed by a water services authority and provision functions performed by a water services provider.⁵¹ Every water services authority has a duty to all consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services.⁵² Further, a water services authority is required to develop a Water Services Development Plan which must form part of its Integrated Development Plan (IDP) required in terms of the Systems Act.⁵³ A water services authority may assume operational responsibility for providing water to end users directly, or may enter into a contract with a water services provider to do so (often a municipal entity such as Johannesburg Water (Pty) Ltd).⁵⁴ District municipalities are by default deemed to be water services authorities. A local municipality wishing to perform the responsibilities of a water services authority must be specifically designated as such.⁵⁵

In summary, South Africa has a progressive legislative and policy framework for water services, which includes a constitutional right to water, as well as a network of legislation and a national Free Basic Water Policy designed to give effect to this right. Within this framework, water is conceived of as a social good and a vital part of the broader developmental project which continues to respond to

47 Sec 152 Constitution.

48 Sec 153(a) Constitution.

49 Sec 4(2)(f) Systems Act.

50 Sec 73 Systems Act.

51 Regulated in ch 3 and 4 of the Services Act respectively.

52 Sec 11(1) Services Act. This duty is subject to a number of factors including the availability of resources and the need for equitable allocation of resources (sec 11(2) of the Services Act). Importantly, a WSA may not unreasonably refuse or fail to provide access to water services to a consumer within its area of jurisdiction (sec 11(4) of the Services Act).

53 Sec 12 Services Act; sec 25 Systems Act.

54 Sec 80(2) Municipal Systems Act; Dugard (n 25) 7. However, before a municipality enters into a service delivery agreement with an external service provider, it must establish a programme for community consultation and information dissemination regarding the appointment of the external service provider and the contents of the service delivery agreement.

55 See sec 84 of the Structures Act.

systemic inequality. However, when it comes to the implementation of this framework at local government level – which serves as the frontline for communities seeking access to water – the reality often is quite different.

Yet, despite – or perhaps because of – these challenges, communities and civil society organisations across South Africa continue to mobilise, advocate and litigate in the hopes of realising their water rights. We turn now to examine one of these stories.

3 *Mshengu & Others v uMsunduzi Local Municipality & Others*:⁵⁶ Facts and findings

The uMgungundlovu District Municipality is located in KwaZulu-Natal, South Africa. It comprises several local municipalities including uMsunduzi and uMshwathi.⁵⁷ The uMgungundlovu region is made up of a mixture of urban and rural areas with the provincial capital Pietermaritzburg falling in uMsunduzi. The StatsSA 2016 Census recorded the population of the uMgungundlovu region as 1 095 865 people comprising 300 953 households. uMgungundlovu is both a water services authority and a water services provider.⁵⁸ uMsunduzi has also been designated as a water services authority.⁵⁹ Approximately 80 per cent of people in the uMgungundlovu region obtain their water from the municipality or other water services provider, while the remaining 20 per cent use boreholes, rainwater tanks, dams, rivers or water vendors.⁶⁰

Many farm dwellers in this region live in appalling conditions. The living conditions of the first and second applicants in *Mshengu* are painfully captured in the judgment. Zabalaza Mshengu was the first applicant. As with his father before him, Mr Mshengu lived his whole life on Edmore farm as a labour tenant. Sadly, on 13 August 2018, a few months before the court case was heard, Mr Mshengu passed away at age 104.⁶¹ He had lived with his son and two adult grandsons

56 *Mshengu & Others v uMsunduzi Local Municipality & Others* 2019 (4) All SA 469 (KZP) (*Mshengu*).

57 In this article, the municipalities will be referred to as uMgungundlovu, uMsunduzi and uMshwathi respectively.

58 Municipalities of South Africa 'uMgungundlovu District Municipality' *Municipalities of South Africa* (2020), <https://municipalities.co.za/overview/120/umgungundlovu-district-municipality> (accessed 9 June 2021).

59 *Mshengu* (n 56) para 33.

60 Umgungundlovu District Municipality 'Draft Annual Report of the uMgungundlovu District Municipality 2018/2019' *Umgungundlovu District Municipality* (2019) 17, http://www.umd.gov.za/Official_Site/index.php/access-to-info/reports/annual-reports (accessed 9 June 2021).

61 M Cabe 'Court judgment to restore farm dwellers' dignity' *New Frame* 29 August 2019, <https://www.newframe.com/court-judgment-to-restore-farm-dwellers->

in old, dilapidated mud structures on the farm. The nearest water source are shallow pools in a dried-up stream 100 metres from their home, but this water is stagnant and not suitable for consumption or anything else. The family thus relies on water from a communal tap on a neighbouring farm more than 500 metres from their home. This tap is at the bottom of a hill and their home is located on top of the hill, meaning that collecting water involves pushing 25 litre cans down the hill on wheelbarrows, through the bush and then hauling them back up the hill.⁶²

Thabisile Ntombifuthi Ngema was the second applicant in the case. She lives on Greenbranch farm in a settlement of 12 households. Their homes, built of blocks and asbestos, are old and dilapidated and the roofs leak when it rains. There are only two communal taps shared by more than 60 people. They therefore have to queue to collect water and sometimes the farm owner switches off the water supply without notice. There are no toilets. When they attempted to create some form of sanitation by digging pit latrines, the farm owner told them that they were not allowed to do this and should instead defecate in the sugar cane plantation as this would act as a form of manure to fertilise his crops. There are no lights in the sugar cane plantation and the open latrines that they are forced to use there are unhygienic, smelly and attract flies and other vermin. Women experience particular humiliation and impairment of their dignity as they have no proper place to dispose of their used sanitary towels. There is also no refuse collection service.⁶³

AFRA's work with farm dwellers in the area in response to conditions such as these has involved ongoing interactions with both farm owners and different levels of government. These engagements over time built useful relationships, but nevertheless did not result in the provision of services so desperately sought by farm dwellers. In the resulting court case, AFRA was included as a third, and institutional, applicant. The reason for this was related to the fact that given their precarious employment and tenure, many farm dwellers were nervous about putting their names on paper in a court case with potentially significant ramifications for their employers.⁶⁴ Using AFRA as an institutional applicant thus was a way to give farm dwellers a level of protection, while still injecting a sense of the systemic picture into the court case.

dignity/ (accessed 9 June 2021).

62 *Mshengu* (n 56) paras 2-3.

63 *Mshengu* paras 4-7.

64 Guest lecture by Adv Tembeka Ngcukaitobi SC on 14 May 2020 in the Human Rights Advocacy and Litigation course in the School of Law at the University of the Witwatersrand.

The applicants sought relief consisting of two parts. First, they sought a declaration that the municipalities' failure to provide farm dwellers with access to sufficient water, basic sanitation and refuse collection is inconsistent with sections 9, 10, 24, 27(1)(b), 33, 152, 153, 193 and 237 of the Constitution,⁶⁵ and an order directing the municipalities to develop a reasonable plan to provide the farm dwellers with sufficient water, basic sanitation and refuse collection in accordance with national regulations, as well as to prioritise and include them in their Integrated Development Plans.⁶⁶ Second, the applicants sought structural relief directing the municipalities to submit plans and reports under oath to the court.⁶⁷

Both uMsunduzi and uMshwathi opposed the application, while uMgungundlovu chose to abide by the Court's decision.⁶⁸ uMsunduzi made the familiar argument that because the applicants resided on private land, it would not be possible for the municipality to provide them with access to water without the land owner's consent, and that in any event it did not have sufficient resources to provide all farm dwellers with access to sufficient water.⁶⁹ In contrast, uMshwathi laid the responsibility for water services provision firmly at the door of uMgungundlovu which are the water services authority with the authority to provide water to communities within its jurisdiction.⁷⁰ At the time the case was launched, neither uMsunduzi nor uMshwathi had Water Services Development Plans which specifically addressed the needs of farm dwellers. uMsunduzi had a generic plan and had promulgated by-laws in terms of which a land owner is obliged to make an application for the connection of water services.⁷¹ For its

65 These sections refer to the rights of everyone to equality (sec 9); human dignity (sec 10); an environment not harmful to health or well-being (sec 24); access to sufficient food and water (sec 27(1)(b)); and just administrative action (sec 33); the objects of local government under ch 7 including to provide democratic and accountable government for local communities, to ensure the provision of services to communities in a sustainable manner, to promote social and economic development, to promote a safe and healthy environment, and to encourage the involvement of communities and community organisations in the matters of local government (sec 152); the developmental duties of local government under ch 7 to structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community amongst others (sec 153); the general provisions regarding appointment of state institutions supporting a constitutional democracy in ch 9 (sec 193) and the general provision under ch 14 which states that all constitutional obligations must be performed diligently and without delay (sec 237). See Constitution of the Republic of South Africa.

66 *Mshengu* (n 56) para 12.

67 *Mshengu* para 13.

68 *Mshengu* para 19.

69 *Mshengu* para 36.

70 It argued that sec 41(1)(f) of the Constitution prevents it from assuming any power or function other than those entrusted to it by the Constitution (*Mshengu* (n 75) para 37).

71 *Mshengu* para 60. This approach is suggested in DWAF's model water services by-laws, sec 2(1) of which reads: 'No person shall be provided with access

part, uMshwathi had no Water Services Development Plan because, as mentioned above, it claimed that the responsibility lay with uMgungundlovu as the water services authority.⁷²

The case was heard on 2 November 2018, and judgment was delivered on 29 July 2019. The Court held that uMshwathi could not absolve itself of responsibility by passing the buck to uMgungundlovu because of the universal services obligation on all municipalities in section 73(1)(c) of the Systems Act to give effect to the provisions of the Constitution and to ensure that members of the local community have access to at least the minimum level of basic municipal services. The Court appeared to interpret this to mean that a local and district municipality would share this responsibility, regardless of whether or not they were designated water services authorities.⁷³

The Court also confirmed that regardless of land ownership, a municipality still has obligations to provide people with access to sufficient water in terms of South Africa's constitutional and legislative system. First, the Court held that a land owner cannot reasonably refuse a municipality access to his land in order to install infrastructure that would facilitate access to water. This is because section 6(2)(1)(e) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) grants farm dwellers the right 'not to be denied or deprived of access to water', making it untenable for a land owner to prevent the municipality from taking steps to provide water on their property, and obliging land owners to act reasonably in reaching agreements with the municipality regarding the provision of services.⁷⁴ In addition, the Court held that land owners must accept that they have 'a secondary obligation' under sections 8 and 27 of the Constitution and the water services authority which confirms that land owners cannot refuse a municipality access for the purposes of installing infrastructure.⁷⁵

Second, because uMsunduzi is a water services authority, it – rather than the land owners – bore the obligation to provide water to farm dwellers. The Court held that land owners had no direct

to water services unless application has been made to, and approved by, the municipality on the form prescribed in terms of the municipality's by-laws relating to credit control and debt collection.' In the course of the litigation, it emphasised that the applicants had neither applied for services in terms of the by-laws, nor attacked the validity of the by-laws themselves, and therefore could not take issue with the Municipality's approach to water services provision (*Mshengu* (n 56) para 66).

72 *Mshengu* (n 56) para 57.

73 *Mshengu* para 65.

74 *Mshengu* para 53.

75 *Mshengu* para 63.

statutory obligation to provide water services unless contracted to do so as a water services provider. The Court further held that even in instances where land owners are to provide water services to others in terms of a contract as a water services intermediary, section 26(3) of the Services Act authorises the water services authority, if the intermediary fails to perform its obligations in terms of the agreement, to 'take over the relevant functions of the water services intermediary'.⁷⁶ This is one of the most interesting and important aspects of the judgment and is discussed in more detail below.

Ultimately, the Court found that the municipalities' ongoing failure to provide farm dwellers living in their jurisdiction with access to sufficient water constituted a violation of sections 9, 10, 24, 27(1) (b), 33, 152, 153, 195 and 237 of the Constitution. It directed the municipalities to comply with the minimum standards for basic water supply contained in Regulation 3(b) and to prioritise the rights of farm dwellers in their IDPs. The Court further outlined how it would supervise the implementation of its judgment – by requiring the municipalities to file a report with the court within six months, identifying all farm dwellers living in the area, specifying whether they have access to water (including quality, quantity and distance) and what steps the municipality intends to take to ensure that they all have access to water. The applicants (and other interested parties) were given one month to comment on this report. Thereafter the municipalities must submit monthly reports setting out their compliance with their plan, on which the applicants and other interested parties should also be given one month to comment.⁷⁷

Both AFRA and the LRC were subsequently involved in facilitating dialogues to spread awareness of the judgment and its implications.⁷⁸ These were reportedly well received and attended by farm dwellers, farm owners, municipalities, the Department of Cooperative Governance and Traditional Affairs (CoGTA) and other government departments – including from regions other than those in which the parties to the litigation live and work.⁷⁹ In addition, the LRC has

⁷⁶ *Mshengu* para 62.

⁷⁷ *Mshengu* para 86. Interestingly, the parts of the order dealing with the need to survey and assess the numbers of farm dwellers and their respective access to water was advocated as part of water services planning by the then Department of Water Affairs and Forestry (DWAF) as far back as 2005. See Department of Water Affairs and Forestry *Ensuring water services to residents on privately owned land: A guide for municipalities* (2005) 10-12. See also Department of Water Affairs and Forestry *Water services intermediary explanatory guideline* (2002).

⁷⁸ Such as those held in Howick in November 2019 and another in Newcastle in March 2020 (interview with Thabiso Mabhense, attorney at the LRC, conducted on 2 April 2020 via Zoom).

⁷⁹ As above.

received a request from a community in Limpopo to run a similar case there, and were considering this at the time of writing.⁸⁰

The six-month report referred to in the court order was initially due to be filed at the end of January 2020. However, while uMshwathi and uMgungundlovu accepted the outcome of the case, uMsunduzi launched an application to appeal the judgment. In response, the LRC filed an application to require compliance with the judgment while the appeal is pending,⁸¹ as ordinarily the lodging of an appeal suspends the need to comply with the court order being appealed. This application was granted, which means that the municipalities are required to file their reports notwithstanding the pending appeal.⁸² Their new deadline for doing so was February 2021. At the time of writing, only uMgungundlovu had filed its report and the applicants were in the process of reviewing it.

The *Mshengu* judgment has far-reaching implications for farm dwellers seeking to claim their water rights, as well as for farm owners and the municipalities in whose jurisdiction they live. The analysis below examines the Court's pronouncements on municipal obligations to provide water on farms. It explores the relationship between local and district municipalities, on the one hand, and between local government and farm owners, on the other.

4 Understanding the water services provisions obligations of local and district municipalities

The involvement of both district and local municipalities is important in *Mshengu*. However, the relationship between them with respect to water services provision is often misunderstood. In terms of the Structures Act, the default position is that a district municipality will be the water services authority, unless a local municipality has been specifically authorised as such.⁸³ In this case, uMsunduzi (a local municipality) had been designated as a water services authority. This means that the default responsibility of uMgungundlovu (a district municipality) for water services provision in uMsunduzi falls away, although uMgungundlovu retains responsibility for water services provision in all the other local municipalities in its district. uMshwathi, on the other hand, had not been designated as a water services authority. This means that uMgungundlovu is responsible for water

80 As above.

81 In terms of the Superior Courts Act 10 of 2013, sec 18.

82 *Mshengu & Others v uMsunduzi Local Municipality & Others* Pietermaritzburg High Court order in Case 11340/17 dated 20 August 2020 (unreported).

83 Secs 83-84 Structures Act.

services provision in uMshwati, although uMshwati retains service delivery obligations with respect to services other than water.

This is not quite the position taken by the Court in *Mshengu*. The judgment finds that all municipalities, regardless of their status as water services authorities, have obligations to deliver services to those living in their jurisdictions, including people living on farms owned by private land owners, and that one municipality cannot try to shift responsibility onto another municipality.

It is possible that what happened is that the particular subtleties of water services provision got lost in broader pronouncements on service delivery in general (as local municipalities do indeed bear service delivery obligations with regard to services other than water). However, bypassing the Services Act framework, which places different responsibilities on municipalities that are water services authorities and those that are not, may ultimately be unhelpful to those seeking to claim their water rights. While at first blush it is tempting to claim the imposition of a universal service obligation on local municipalities regardless of their designation as water services authorities or not as a victory, the risk is that the resulting duplication of functions between district and local municipalities with regard to water services provision might only further frustrate attempts to practically access water.⁸⁴

Interestingly, neither AFRA nor their attorneys seemed particularly concerned about these nuances as their view was that, in practice, the district and local municipalities would work together collaboratively to ensure that services are delivered. Their position was that the far greater need for clarity lay in the distribution of obligations between municipalities and private land owners.⁸⁵

5 What role do private land owners have in providing water on farms?

One of the key issues raised by this case is the role that private land owners play in providing water on farms. Indeed, the need to answer this question was the very reason that the court case was launched.⁸⁶

84 Although the non-compliance by uMshwati and uMsunduzi with the court order arguably validates the court's approach in holding both local and district municipalities accountable for water services provision.

85 Interview with Thabiso Mabhense (n 78); interview with Mondli Zondi (n 9).

86 Note that farm owners were not ultimately the target of the litigation in terms of how the case was framed by the applicants. This is attributable to the inevitable strategic trade-offs inherent in PIL. Initially, the applicants sought clarity about the obligations on both the municipalities and private land owners. The land owners

The need to understand this issue is not unique to the applicants in the case. During the 2014 hearings on the status of water services provision conducted by the South African Human Rights Commission (SAHRC), many people in farming communities raised the concern that they were reliant on the landowner for the provision of basic services, and the resulting SAHRC report highlighted the fact that the main reason that farm dwellers are unable to access water is because they live on privately-owned land.⁸⁷

The *Mshengu* judgment is unequivocal in its dismissal of any attempt by the municipalities to lay the blame at the door of farm owners, and confirms a clear obligation on municipalities to ensure that people living within their jurisdiction have access to sufficient water. However, the picture may not be as simple as that. In order to properly unpack the issues, it is instructive to first consider the human rights obligations attaching to private actors more generally in South Africa.

5.1 Human rights obligations on private actors in South Africa

One of the defining features of the South African Constitution is the way in which it envisages private actors bearing rights obligations. Section 8(2) of the Constitution provides that '[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. The language of this provision does not impose absolute obligations on private actors. Rather, it indicates that when determining whether section 8(2) is applicable, one must establish whether the section applies in a particular case and, if it does apply, the extent to which it applies. In answering these questions, a court must take into account (a) the nature of the right and (b) the nature of any duty imposed by the right.⁸⁸

initially opposed the application, but offered to withdraw their opposition if the applicants withdrew the relief it sought against them. In order to best serve their clients' interests, the applicants agreed to this. Adv Tembeka Ngcukaitobi SC, one of the advocates representing the applicants, explains that the immediate priority was to get the *Mshengu* judgment enforced in order to get services to farm dwellers as fast as possible. Perhaps the next wave of litigation will be the time to focus on the obligations of land owners (Ngcukaitobi (n 64)).

87 South African Human Rights Commission 'Report of the Right to Access Sufficient Water and Decent Sanitation in South Africa: 2014' (2014) 14, [https://www.sahrc.org.za/home/21/files/FINAL%20th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20\(2\).pdf](https://www.sahrc.org.za/home/21/files/FINAL%20th%20Proof%204%20March%20-%20Water%20%20Sanitation%20low%20res%20(2).pdf) (accessed 9 June 2021).

88 For discussion of the operation of sec 8(2), see D Bilchitz 'Corporate law and the Constitution: Towards binding human rights responsibilities for corporations' (2008) 125 *South African Law Journal* 754; C Sprigman & M Osborne 'Du Plessis is not dead: South Africa's 1996 Constitution and the application of the Bill of

The courts have considered this provision in only a limited number of cases⁸⁹ and the jurisprudence has offered limited and confusing elaboration on the meaning of section 8(2). In particular, it does not clarify the question of whether private actors bear *positive* obligations to realise rights.⁹⁰ We must thus look elsewhere for insight into how the provision works. In her seminal analysis of section 8(2) of the Constitution,⁹¹ Meyersfeld argues that where appropriate, section 8(2) may apply to *any* right in the Bill of Rights, even to socio-economic rights.⁹² This would include the right to water. She further argues that the Constitution indeed envisages situations where private actors bear positive obligations to realise rights, and further that in particular circumstances, private actors may even be required to commit financially to the fulfilment of the socioeconomic rights of indigent people.⁹³

Whether or not one agrees with the approach adopted by Meyersfeld,⁹⁴ it is clear that the South African constitutional framework foresees at least the possibility that obligations to realise rights contained in the Bill of Rights might attach to private actors. While there is contestation around the circumstances in which it might be appropriate to oppose such obligations, in both the courts⁹⁵ and among legal scholars,⁹⁶ no-one disputes the fact that the Bill of Rights applies horizontally in at least some cases. It is in this context that it is useful to examine the right to water in more detail because the Services Act expressly codifies circumstances in which private

Rights to private disputes' (1999) 15 *South African Journal on Human Rights* 25; H Cheadle & D Davis 'The application of the 1996 Constitution in the private sphere' (1997) 11 *South African Journal on Human Rights* 44.

89 These include *Governing Body of the Juma Masjid Primary School & Others v Essay NO & Others* 2011 (8) BCLR 761 (CC), *Daniels v Scribante & Another* 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (*Daniels*) and *AB & Another v Pridwin Preparatory School & Others* 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC).

90 Of these cases, *Daniels* goes furthest but even then only states that its previous pronouncements on sec 8(2) had 'not held that under no circumstances may private persons bear positive obligations under the Bill of Rights' (*Daniels* (n 89) para 48).

91 B Meyersfeld 'The South African Constitution and the human rights obligations of juristic persons' (2020) 137 *South African Law Journal* 439.

92 Meyersfeld (n 91) 443. See also M Pieterse 'Indirect horizontal application of the right to have access to health care services' (2007) 23 *South African Journal on Human Rights* 157.

93 Meyersfeld (n 91) 443.

94 Which is persuasive.

95 Eg, in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & Another* 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) the Constitutional Court confirmed the obligation on private property owners to allow longterm occupiers to remain on their property, providing water and electricity, until the state finds alternative accommodation for such occupiers.

96 Meyersfeld argues that one of the circumstances in which sec 8(2) will apply is where there is a special relationship between a juristic person and an individual, and the power and capability to fulfil that individual's right rests wholly within the control of the juristic person (Meyersfeld (n 91) 445).

land owners will be responsible for providing water, and thus for realising the right to water for people living on privately-owned land.

5.2 An obligation on farm owners to realise the right to water?

5.2.1 *Who bears the obligation to provide water and where is it sourced?*

As discussed above, the right to water imposes both positive and negative duties on the state. The question that arises is whether similar obligations attach to private actors in the context of the right to water specifically. The *Mshengu* judgment holds that land owners must accept that they have ‘a secondary obligation’ under sections 8 and 27 of the Constitution.⁹⁷ By holding that a land owner cannot reasonably refuse a municipality access to his land in order to install infrastructure that would facilitate access to water,⁹⁸ the Court clearly adopts the position that *negative* duties can attach to private actors. This accords with the Constitutional Court’s interpretation to date of section 8(2) of the Constitution.⁹⁹ However, this does not resolve the question of whether private actors have *positive* obligations to realise the right to water. A further investigation of the Services Act reveals some interesting possibilities in this regard.

Foreseeing a role for private actors in the realisation of the right to water, when the Services Act was passed in 1997, it introduced the notion of a water services intermediary (an intermediary). An intermediary is someone who has a contract with someone else, which contains an obligation to provide the other party to the contract with water services, and where this obligation is incidental to the main objects of the contract.¹⁰⁰ The key conditions for the existence of a water services intermediary are thus that (a) there must be an obligation to provide services; (b) the obligation must exist in terms of a contract, either written or verbal; and (c) the obligation must not be the main reason for the contract to exist.

⁹⁷ *Mshengu* (n 56) para 63.

⁹⁸ On the basis that sec 6(2)(1)(e) of the Extension of Security of Tenure Act 62 of 1997 (ESTA) grants farm dwellers the right ‘not to be denied or deprived of access to water’ making it untenable for a land owner to prevent the municipality from taking steps to provide water on their property, and obliging land owners to act reasonably in reaching agreements with the municipality regarding the provision of services (*Mshengu* (n 56) para 53).

⁹⁹ See the cases referred to in n 89.

¹⁰⁰ Sec 1(xxii) Services Act.

This is applicable in the scenario where a farm owner has an employment contract with his workers or a lease agreement with a labour tenant. Such contracts often provide for the worker to live on the farm. In such cases, the obligation to provide water can be implied because the worker would not be able to access water other than on the farm. This obligation also is not the main reason for the contractual relationship, which in this scenario would be either employment or tenancy. The farm owner would therefore be an intermediary in terms of the Services Act as the conditions listed above are met.¹⁰¹

A farm owner's (positive) obligation to provide water services can thus exist by virtue of a contract between a farm owner and a farm dweller. Nevertheless, the significance of the contract is only that it is what makes the farm owner an intermediary. As soon as that is the case, statutory obligations in terms of the Services Act attach to the intermediary. Moreover, as discussed below, because the obligation is founded in legislation, it can then be enforced by a municipality, notwithstanding the fact that the municipality is not a party to the contract. Importantly, the Services Act further specifies that every water services authority must pass by-laws that cover the conditions for the provision of water services.¹⁰² These by-laws can thus address what level of services must be provided on privately-owned land, the relative rights and responsibilities of the water services authority, the water services provider, if appropriate, water services intermediaries and consumers.

The answer to the question of who bears the obligation to provide water services, therefore, is that the municipality that is designated as a water services authority does, unless the water services authority has entered into a contract with a water services provider, or an intermediary exists.¹⁰³

5.2.2 In what form must water be provided?

Assuming an intermediary does exist, as this will often be the case in relation to farm owners and farm dwellers, in what form is it required to provide water? Section 25(1) of the Services Act provides that '[t]he quality, quantity and sustainability of water services provided a water services intermediary must meet any minimum standards

101 Where a farm owner rents the farm to a tenant who in turn employs workers, the tenant could be the intermediary.

102 Sec 1 Services Act.

103 Interview with Abri Vermeulen, principal at Pegasys and former Director in the Department of Water and Sanitation, conducted on 3 April 2020 via Zoom.

prescribed by the Minister and any additional minimum standards prescribed by the relevant water services authority'. In the case of people who qualify for the minimum basic water supply (as most farm dwellers will) an intermediary must provide a basic water supply in compliance with Regulation 3(b) of the 2001 National Norms and Standards. That is, a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute, within 200 metres of a household, and with an effectiveness such that no consumer is without a supply for more than seven full days in any year.

In rural areas, water often is sourced from rivers, dams and groundwater rather than municipal supply. During the court case, uMsunduzi argued that a land owner who is liable to provide the basic requirements of occupation to an occupier under ESTA may intend to provide access to water through a source other than a piped water supply system. Their position was that if alternative water sources were envisaged by a land owner (such as a borehole) it would be inconceivable that farm dwellers could insist on the provision of water through a piped water supply system from the municipality where their contractual relationship with the land owner envisaged only the supply of water from a borehole.¹⁰⁴

However, an intermediary cannot contract out of the statutory obligation laid out in section 25(1) of the Services Act, read with Regulation 3(b). This means that even if a farm owner has agreed to supply workers with less than this (for instance, water from a borehole that is 500 metres away) farm dwellers can insist on the basic water supply standards. uMsunduzi therefore is correct that farm dwellers cannot insist on piped water to their homes, but water provision by the land owner must still meet the quantity, distance, flow rate and consistency required by the national norms and standards.

5.2.3 *Who pays?*

This level of service is rather much to ask from an intermediary, so who pays the costs of installing and maintaining the infrastructure, and for reticulation? If an intermediary is present, a municipality may want the intermediary to shoulder the costs of water provision. However, it is important to ensure that the implementation of the intermediary system is financially viable. On the issue of how to resource the fulfilment of socio-economic rights, the Constitutional

¹⁰⁴ *Mshengu* (n 56) para 61.

Court has indicated that it would be unreasonable to require private persons to bear the exact same obligations under the Bill of Rights as does the state.¹⁰⁵

Section 25(2) of the Services Act states that an intermediary may not charge for water services at a tariff that does not comply with any norms and standards prescribed under the Services Act and any additional norms and standards set by the relevant water services authority. This suggests that where national regulation requires the provision of a *free* basic water supply, this is what an intermediary must provide, provided that all the usual processes and requirements of the Free Basic Water Policy are met (which, for example, may involve registration on a municipal indigent register).¹⁰⁶

Municipal by-laws are the instrument through which it is possible to balance the different interests of the various parties. A 2005 DWA Guide to municipalities on the topic of how to ensure water services to residents on privately-owned land (DWA Guide) proposes that where private land owners are involved, municipalities should draft a funding framework for the provision of water services, and emphasises that there are various incentives and subsidies for which an intermediary can apply to fund the development of water services infrastructure and improvements in water quality.¹⁰⁷ These include using a portion of a municipality's equitable share to ensure service provision to poor households on privately-owned land,¹⁰⁸ or a municipal infrastructure grant (MIG) which can be used to provide services to households on land that they do not own, provided that the intermediary makes a financial contribution (because the land owner becomes the owner of the infrastructure once it is installed).¹⁰⁹

However, this is not uncomplicated. Normally, operational and maintenance costs should be paid by water users but subsidised

¹⁰⁵ *Daniels* (n 89) para 40. However, but note Meyersfeld's argument that private actors in certain circumstances can be required to commit financial resources towards the realisation of socio-economic rights (*Meyersfeld* (n 91) 441).

¹⁰⁶ The Systems Act requires municipalities to develop indigent policies to facilitate the provision of free basic services to poor households. In developing their own indigent policies, municipalities are guided by the National Indigent Policy Framework and Guidelines developed by CoGTA which ensure some degree of uniformity in municipal indigent policies, while retaining municipal discretion to decide on the details. Most municipalities identify indigent households through means testing and require qualifying households to register as indigent. See further SERI 'Turning off the tap: Discontinuing universal access to free basic water in the City of Johannesburg' Working Paper 3 (March 2018) 4.

¹⁰⁷ Department of Water Affairs and Forestry *Ensuring water services to residents on privately owned land: A guide for municipalities'* (2005) 14.

¹⁰⁸ The Equitable Share is an unconditional grant designed to supplement municipalities' revenue to deliver services to poor households.

¹⁰⁹ An MIG is an infrastructure grant used to expand the delivery of basic services to poor households.

by the equitable share. In relation to the provision of a basic water supply, income from user tariffs obviously is not relevant and the full costs must be sourced elsewhere. The picture is further complicated by the reality that many municipalities are dependent on government grants for their very survival (especially rural municipalities that do not have many consumers that can afford to pay for services). In the absence of tariff income, municipalities under financial strain thus sometimes use their equitable share to pay staff salaries, leaving little left over to actually cover the costs of service provision.¹¹⁰

In the end, municipal by-laws are the tool that a municipality can use to regulate exactly what is expected of an intermediary. A municipality can even use its by-laws to specify what types of materials and brands of pipes the intermediary should use when installing infrastructure in order to ensure consistency across all municipal infrastructure within its jurisdiction. If an intermediary cannot afford to pay for what is specified, the municipality can reach an agreement to give the intermediary assistance through subsidies and financial breaks elsewhere.¹¹¹ In short, then, the answer to who pays is that it is the intermediary, but there are various avenues available for intermediaries to tap into municipal funding to make this workable in practice.

5.2.4 *Municipal oversight of intermediaries*

Where an intermediary exists, they may thus bear considerable obligations to provide water services. Nevertheless, as confirmed by the court in *Mshengu*, ultimate accountability still resides with the municipality that is the water services authority for the area. So how can municipalities exercise oversight of intermediaries? Relying again on the by-law-driven approach, municipalities can write oversight mechanisms into their by-laws. Section 27 of the Services Act also requires water services authorities to monitor that intermediaries are complying with any applicable standards. In fact, uMgungundlovu's water services by-laws make provision for individuals and institutions to apply to be registered as intermediaries. Registered intermediaries must submit a quarterly report to the municipality in order to enable

¹¹⁰ Interview with Abri Vermeulen (n 103).

¹¹¹ Note that although it may be useful to have an intermediary cover these costs, a municipality needs to think long term about what happens when an intermediary ceases to exist (such as when a mine that has been acting as an intermediary by virtue of the employment contracts it has with mineworkers, closes) (interview with Abri Vermeulen (n 103)).

uMgungundlovu to monitor whether the intermediary is operating in accordance with the Services Act.¹¹²

As a complement to this, using an incentive-based approach, municipalities can also encourage private services provision through subsidies and tax incentives. A combination of approaches can also be used. Typically, a municipality will declare a group of people (such as farm owners) as water services intermediaries, use regulations or directives to set out their rights and responsibilities, and offer a tax rebate if they comply with their obligations within a prescribed time period.

Section 26 of the Services Act, which was highlighted by the Court in *Mshengu*, sets out the action which a water services authority may take should an intermediary fail to fulfil its obligations. Essentially, in such circumstances a water services authority should put the intermediary on terms to rectify the failure (this communication could spell out the nature of the failure, what steps should be taken to rectify it, and set out a reasonable time period within which to comply). If the intermediary continues its non-compliance, then the water services authority is empowered to take over the functions of the intermediary (or appoint another water services institution to do so).¹¹³ Nevertheless, this mechanism for municipal takeover is not popular. Given the number of responsibilities already shouldered by a municipality, it is likely to prefer to take action against the intermediary rather than to take back the responsibilities concerned.¹¹⁴

Interestingly, the DWAF Guide mentions that consumers may insist that a water services authority intervene if an intermediary is not up to scratch, including by approaching a court. Again this does not seem to be something that often happens,¹¹⁵ but it is an avenue open to farm dwellers where a municipality is failing to hold an intermediary to account, as they could use this mechanism to pressurise the municipality into exercising its oversight role.

5.2.5 An analysis of the water services intermediaries system

There is no doubt that the intermediary system provides a useful way to understand water services provision on privately-owned

112 uMgungundlovu District Municipality 'Water Services By-laws' uMgungundlovu District Municipality (2020), clauses 89-93, http://www.umd.gov.za/Official_Site/index.php/access-to-info/legal-documents/bylaws/water-services-by-laws (accessed 9 June 2021).

113 This approach is echoed in the DWAF Guide. See n 107.

114 Interview with Abri Vermeulen (n 103).

115 As above.

land. Located within a broader constitutional dispensation that makes provision for the horizontal application of the Bill of Rights, by expressly legislating on the intermediary system, the Services Act codifies how rights obligations can be placed on farm owners. Moving beyond legal theory, the intermediary system offers a practical way for municipalities to draw on private resources.

The system, however, not without its challenges. First, placing service provision obligations on farm owners requires some delicate balancing in practice. The more municipalities demand improved service provision from land owners, the greater the incentive for the land owner to scale down the provision of accommodation to workers because it is too much of a bother, and thus the greater the risk of the eviction of workers. This is not only problematic for farm dwellers but also places greater stress on municipal resources. It thus is in the municipality's interests to ensure that accommodation continues to be provided by land owners.¹¹⁶

Second, while a municipality is empowered both to pass by-laws and to come to a contractual agreement with a land owner in terms of the installation of and payment for infrastructure, municipal officials often are reluctant to do so. This relates to the occurrence of local government elections every five years. Entering into this kind of an agreement with potentially far-reaching implications for land owners remains unusual at local government level, even though it is envisaged by the regulatory framework. Municipal officials therefore are likely to be hesitant to stick their necks out, as any action on their part which is perceived as 'unusual' makes them politically vulnerable as it provides a possible excuse to remove them.¹¹⁷

Perhaps the biggest challenge is that making this system work is quite heavily dependent on the water services authority having passed by-laws regulating intermediaries. Dealing with water services provision on private land in this way thus requires proactive action which, given the extent of demands on municipalities, often just is not a priority.¹¹⁸ The general consensus in the water sector is that the Services Act should be rewritten because it was enacted before the local government legislation (such as the Systems and Structures Act) was promulgated.¹¹⁹ If the Act is revised, this would present an opportunity to centralise the regulation of intermediaries

116 DWAF Guide (n 107) 18.

117 Interview with Abri Vermeulen (n 103).

118 As above.

119 No one foresees a departure from the basic principles in the Services Act but rather an alignment with subsequent legislation.

by including a ministerial power to issue regulations governing intermediaries, so that this is not so heavily dependent on individual municipalities pro-actively passing by-laws that do so.¹²⁰

Lastly, by definition, the intermediary system only operates where there is a contract between a farm dweller and farm owner. There thus is a need to address water services provision to people living on private land where there is not an intermediary, particularly where a farm owner is an intermediary with respect to farm workers with whom he has employment contracts, but not with respect to other people who live on the farm but who do not work for him. At first glance this may seem to lead to the rather bizarre result that a farm community may be split such that a farm owner must provide water services to all his contracted employees but the municipality remains responsible for providing water services to those people in relation to whom the farmer is not an intermediary.

The provisions of ESTA may go some way towards addressing this. The Preamble to ESTA states that one of its purposes is to provide for the conditions of residence on certain land, and section 6(2)(e) provides that an occupier¹²¹ has the right not to be denied or deprived of access to water. This protects a farm dweller's rights where an intermediary is not present, but does not answer the question of whether it is the municipality or the land owner who must provide water services in such a scenario.

The *Mshengu* judgment states that land owners have no direct statutory obligation to provide water services unless contracted to do so as a water services provider, although a land owner may acquire obligations as a water services intermediary in terms of a contract. This is not strictly accurate as the contract is important but only because it is what makes the land owner an intermediary. As soon as this happens, statutory obligations in terms of the Services Act attach to the intermediary and, as explained above, this is significant because it gives the municipality tools to exercise oversight over the land owner. The Court in *Mshengu* adopts a narrower view – it does not actually say that farm owners are water services intermediaries. Instead it holds that a farm owner's obligation is merely to allow

120 As above.

121 Defined in ESTA as a person residing on land that belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding (a) a labour tenant in terms of the Land Reform (Labour Tenants) Act 3 of 1996; and (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and (c) a person who has an income in excess of the prescribed amount.

municipal officials access to his land for the purposes of installing or repairing infrastructure.

However, by entrenching the notion of an intermediary in the legislative framework, the Services Act provides a mechanism with which obligations to realise the right to water can attach to private actors. Importantly, the intermediary mechanism is a nuanced one with in-built checks and balances.¹²² It is designed to make it practically possible to implement rights obligations on intermediaries.

The *Mshengu* case provides a useful springboard from which to engage in these debates around the obligations of local and district municipalities, and of the respective obligations of private land owners and local government. However, the importance of this litigation extends beyond the content of the judgment. We now turn to consider other ways in which the litigation can be considered valuable.

6 Value of the *Mshengu* judgment

Public interest litigation (PIL) is one of the strategies available to those seeking to enforce their rights in South Africa. Much has been written about the relationship between litigation and other tools of struggle, and it is always useful to reflect on what value a judgment brings to rights-based struggles.

6.1 Typologies of impact

The use of law, in general, and litigation, in particular, to achieve social and economic change has been much debated and critiqued. Many activists and scholars argue that the law is ideologically biased towards the preservation of the *status quo* and that judges tend to favour powerful economic interests.¹²³ Detractors of PIL highlight that it can be expensive, time-consuming and risky.¹²⁴ A key criticism of PIL is that over-reliance on legal strategies can be detrimental to societal transformation as legal strategies can demobilise political ones¹²⁵ by

122 Any concerns about opening the floodgates of private sector responsibility should thus be allayed.

123 P Gabel & D Kennedy 'Roll over Beethoven' (1984) 36 *Stanford Law Review* 1.

124 Foreword of Open Society Justice Initiative 'Strategic litigation impacts: Insight from global experience' (2018) 13, <https://www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf> (accessed 9 June 2021).

125 SL Cummings & D Rhode 'Public interest litigation: Insights from theory and practice' (2009) 36 *Fordham Urban Law Journal* 604 607; M McCann & H Silverstein 'Rethinking law's "allurements": A relational analysis of social

altering radical aspirations,¹²⁶ and deflecting resources and attention away from collective grassroots action.¹²⁷ PIL is also critiqued from a decoloniality perspective by scholars who emphasise the need to recognise the ways in which racial identities and hierarchies are embedded in legal systems, in general, and human rights discourses in South Africa, in particular.¹²⁸

In contrast, other commentators urge critics to adopt a bottom-up lens and examine how social movements use litigation despite its limitations, and to acknowledge how the tactical uptake of rights and litigation as part of broader strategies can help social movements. A growing awareness of the political utility of PIL frames it as a means of interrogating, asserting and disrupting power,¹²⁹ and acknowledges its potential to catalyse and strengthen social mobilisation. Understood in this way, PIL can help to frame and develop collective identity,¹³⁰ foster cohesion between groups that may have had differences in the past¹³¹ and amplify community voices where political avenues have failed.¹³² Such an approach views the 'law as politics by another name, and links court-room battles to political mobilization and community organizing'¹³³ and understands that PIL can disrupt entrenched institutional power if used strategically and in combination with other strategies.¹³⁴

Within the broader contestation around the use of law and PIL, one of the particular challenges is how best to assess whether PIL is achieving the social change it seeks to. There is a rich and growing body of literature – both internationally and in South Africa – that

movement lawyers in the United States' in A Sarat & SA Scheingold (eds) *Cause lawyering: Political commitments and professional responsibilities* (1998) 262-263.

126 W Brown & J Halley *Left legalism/left critique* (2002).

127 McCann & Silverstein (n 125) 262; Cummings & Rhode (n 125) 608.

128 J Modiri 'The colour of law, power and knowledge: Introducing critical race theory in (post-) apartheid South Africa' (2012) 28 *South African Journal on Human Rights* 405; T Madlingozi 'Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution' (2017) 28 *Stellenbosch Law Review* 123 146.

129 Open Society Justice Initiative *Strategic litigation impacts: Insight from global experience* (2018) 60.

130 M McCann *Rights at work: Pay equity reform and the politics of legal mobilisation* (1994), as discussed in J Dugard & K Drage 'Shields and swords: Legal tools for public water' Occasional Paper 17 (2012) commissioned by the Municipal Services Project 6.

131 'Public interest legal services in South Africa' (November 2015) report prepared by the Socio-Economic Rights Institute of South Africa Executive Summary (PILS Report) 52, https://www.seri-sa.org/images/SERI_PILS_Executive_SUmmary_final_for_web.pdf (accessed 9 June 2021).

132 This is evidenced by the response of one of the applicants in *Mazibuko* (n 1) to the Constitutional Court judgment (discussed in Dugard & Langford (n 27) 58).

133 Cummings & Rhode (n 125) 612-613.

134 Cummings & Rhode (n 125) 610; CF Cabel & WH Simon 'Destabilisation rights: How public law litigation succeeds' (2004) 117 *Harvard Law Review* 1015.

examines typologies of impact of PIL.¹³⁵ Two approaches have dominated these debates. The materialist approach evaluates the impact of PIL by seeking to identify a linear relationship of cause and effect between a court case and what measurable direct benefits could be attributed to the case.¹³⁶ The materialist approach would thus evaluate litigation on water rights by asking, quite practically, whether the claimants were provided with water following the litigation.

However, the materialist approach has been much critiqued for adopting an overly narrow and limited lens in assessing the impact of PIL. A growing recognition that PIL can have value beyond the practical, material impacts of a court order has resulted in the development of the legal mobilisation approach which asserts that litigation can indirectly effect social change through the mobilisation catalysed in preparation for it, and in its aftermath.¹³⁷ Legal mobilisation theorists argue that litigation can result in changes in ideas, perceptions and collective social constructs relating to the subject matter of the litigation and that

even when judges' holdings are contrary to the positions of those promoting social change, judicial [and linked mobilisation] processes can nonetheless generate transformative effects by increasing visibility of the problem in the media or by creating lasting bonds between activist organisations. These alliances can outlast the decision and lead to collective political actions that promote the same cause in contexts other than the courtroom.¹³⁸

South Africa has a strong tradition of PIL and, thus, questions about its value have loomed large for everyone involved. Mirroring the

135 See G Marcus & S Budlender 'A Strategic Evaluation of Public Interest Litigation in South Africa' (2008), <http://www.atlanticphilanthropies.org/learning/strategic-evaluation-publicinterest-litigation-south-africa> (accessed 9 June 2021); Dugard & Langford (n 27); D Cote & J van Garderen 'Challenges to public interest litigation in South Africa: External and internal challenges to determining the public interest' (2011) 27 *South African Journal on Human Rights* 167; G Marcus, S Budlender & N Ferreira 'Public interest litigation and social change in South Africa: Strategies, tactics and lessons' (2014) *Atlantic Philanthropies*, <https://www.atlanticphilanthropies.org/wp-content/uploads/2015/12/Public-interest-litigation-and-social-change-in-South-Africa.pdf> (accessed 9 June 2021); S Wilson 'Litigating housing rights in Johannesburg's inner city: 2004-2008' (2011) 27 *South African Journal on Human Rights* 127; T Madlingozi 'Post-apartheid social movements and legal mobilisation' in Langford et al (n 27) 92; PILS Report (n 131); J Brickhill 'Introduction: The past, present and promise of public interest litigation in South Africa' in J Brickhill (ed) *Public interest litigation in South Africa* (2018) 41.

136 One of the most vocal proponents of the materialist approach internationally has been Gerald Rosenberg. For a discussion of Rosenberg's position and its application (or not) to the South African context, see Wilson (n 135) 127.

137 McCann (n 130).

138 C Rodríguez-Garavito 'Beyond the courtroom: The impact of judicial activism on social and economic rights in Latin America' (2011) 89 *Texas Law Review* 1669.

international trends, the legal mobilisation approach has gained much traction in South Africa where there is a broad consensus that, despite its limitations, in some form and in the right conditions, PIL remains a powerful vehicle to facilitate social change.¹³⁹ Wilson reminds us that the important thing is to ‘guard against both an over-reductive approach, which posits that litigation can never “ultimately” make a difference, and the over confidence of the intellectually able, but socially dislocated, elite practitioner who equates social change with “good jurisprudence”’.¹⁴⁰

One of the most seminal contributions on the appropriateness of adopting the broader lens inherent in the legal mobilisation approach is that of Dugard and Langford.¹⁴¹ In their critique of a 2008 report commissioned by the Atlantic Philanthropies (one of the main funders of human rights organisations at the time), Dugard and Langford question whether PIL is ‘a matter of art or science’ and conclude that it cannot be considered a science because the causal relationship between PIL and both successful judicial outcome and maximum social impact is too complex. Instead, they propose a more expansive model for analysing the impact and value of PIL which requires one to understand the role of law as a politicising agent in the relationship between structures of power (whether social, political or socio-economic) and the agency of social actors.¹⁴² In the last decade there have been a number of other contributions to the debate around how best to assess the impact of PIL in South Africa.¹⁴³

In the most recent contribution, Brickhill has posited a typology of impact consisting of three categories of impact, namely, legal, material and political (referred to here as the Brickhill typology).¹⁴⁴

139 PILS Report (n 131) 3. The South African courts have affirmed the value of PIL on a number of occasions. Eg, in *Mazibuko* the Constitutional Court held: ‘The purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections over specific aspects of government policy ... Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our Constitution and, in particular, the principles that government should be responsive, accountable and open’ (*Mazibuko* (n 1) paras 159-163). See also *Biowatch Trust v Registrar Genetic Resources & Others* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC); *Company Secretary of Arcelormittal South Africa & Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA); [2015] 1 All SA 261 (SCA).

140 Wilson (n 135).

141 Dugard & Langford (n 27).

142 Dugard & Langford (n 27) 41, as discussed in Brickhill (n 135) 2.

143 See the sources referred to in n 135.

144 Brickhill (n 162) 42. His typology draws on the work of Dugard & Langford (n 27), Langford et al (n 27) and Rodriguez-Garavito (n 138).

In the Brickhill typology, material effects include the provision of social goods or services, the payment of compensation or damages, and compelling or prohibiting specific conduct. Legal effects are defined to include challenges to law or policy.¹⁴⁵ Political impact is concerned with the effect of litigation on power relations, discourse and the 'agenda' in relation to a particular set of issues.¹⁴⁶ Essentially the combination of his material and legal effects represent a generous explanation of traditional materialist approaches, while his understanding of political impact resonates with legal mobilisation approaches discussed above. In the next part we apply Brickhill's typology of impact to the *Mshengu* case.

6.2 Impact of the *Mshengu* litigation

What follows is not an exhaustive analysis of the impact of the *Mshengu* litigation but rather offers some reflections on why the litigation is valuable, located within the framework of Brickhill's typology of impact.

With regard to material effect, the farm dwellers concerned have yet to receive water at their homes. While this might spark a temptation to critique the judgment as lacking any material impact, it probably is too soon to make such a determination. In addition, regard must be had to the remedy that was requested by, and ultimately granted to, the applicants. In PIL, it often is tempting to go for the big win. In this case, the big win would have been the immediate provision of water and other services to all farm dwellers. However, the risk of asking for a far-reaching remedy such as this is that a court might be hesitant to grant it, given, among other things, the resource implications. The strategic approach often is to frame the case in such a way that the resulting judgment might be a slightly smaller win in the short term, but which lays the groundwork for future action.¹⁴⁷

This is precisely what the applicants did in this case. While a request for immediate water provision may not have been granted (if asked for), their request for the municipalities to develop a plan for the provision of water (and other services) going forward, was granted. In the circumstances, it would be unreasonable to claim that the *Mshengu* judgment lacks material effect as the remedy granted by

145 Brickhill (n 135).

146 Brickhill (n 135) 43.

147 Ngcukaitobi (n 64).

the Court envisages a process culminating in the provision of water to farm dwellers much further down the line, rather than immediately.

A further way in which the litigation can be understood as having value in the form of material effect is that the judgment offers the promise of greater uniformity in water provision on farms. Previously farm dwellers obtained water in a variety of ways. Some of them lived on farms where they were permitted to use existing boreholes or communal stand pipes. However, most were left to fend for themselves, sharing the water supply provided to farm animals, fetching (and buying) water from neighbouring farms, or collecting it from streams and dams. What was striking, however, is that both the availability and quality of water varied greatly from farm to farm and often was heavily dependent on the relationship between an individual farm owner and his workers and tenants. This limited the ability of farm dwellers to claim their water rights, for fear of being deprived of what little access they might have. The judgment changes this, as farm dwellers now have recourse other than to the whims of their employers or landlords. While this still does not mean that the applicants have achieved access to water in practical terms, down the line if – and hopefully when – they do, water will be provided in a more uniform way across farm boundaries.

An assessment of the legal effect requires an examination of whether the judgment has resulted in any changes to law or policy. The judgment has not changed the law, but has provided very useful clarity on the law. This is especially significant because previously, many municipalities and farm owners had been willing to do their part but had been hamstrung by not knowing what they could or should be doing.¹⁴⁸ The judgment has been favourably received by other municipalities that seek to understand its implications for water services provision in their own jurisdictions.¹⁴⁹ Notwithstanding the obligations it places on them, the municipalities that have been attending the dialogues hosted by AFRA are reportedly pleased that the judgment resolves the problem they had been facing of being prevented from accessing farms by farm owners.¹⁵⁰ Nevertheless, the failure of the judgment to engage in more detail with the intermediary system is unfortunate, and qualifies the claim that the judgment has legal effect as it provides greater clarity on existing legal obligations.

In addition to material and legal impact, the *Mshengu* litigation has also had political impact in at least two important ways. First,

148 As above.

149 As above.

150 Interview with Thabiso Mabhense (n 78).

after years of careful engagement with several municipalities and a range of farm owners, AFRA and the farm dwellers with whom they work are now being taken seriously. The litigation has opened doors that were previously closed. For example, throughout the litigation process, AFRA had been collecting data on how many people living on farms were affected, and what kind of services they currently had, if any. They had been trying, unsuccessfully, for some time to inject this data into various municipal processes. However, once the judgment was handed down, and the municipalities began to compile the first report required by the court order, they turned to AFRA requesting the results of their surveys.¹⁵¹ A further example of this shift in the relationship is that alongside the litigation, AFRA has made submissions to uMgungundlovu on how farm dwellers should be catered for in its IDP. Their suggestions have been taken on board and incorporated into the IDP. It thus is clear that the litigation has shifted the power relations between the parties, one of the hallmarks of the political impact recognised under the legal mobilisation approach.

Second, the case seems to have brought the local and district municipalities closer together (particularly uMshwati and uMgungundlovu). Both the build-up to the litigation and AFRA's work to conscientise various stakeholders about the contents of the judgment have brought the different municipalities into the same room repeatedly. Other local municipalities in the district have also been attending these talks, purportedly because they too want to use the judgment in order to implement services. There appears to be no obvious conflict between the municipalities, but rather the sense that they are taking a collaborative approach to water services provision.¹⁵² This increased collaboration and cohesion also resonates with the kind of litigation value proposed under the legal mobilisation approach.

The *Mshengu* litigation thus has value on each of Brickhill's typologies of impact, namely, material, legal and political.

7 Conclusion

The *Mshengu* case thus illustrates that public interest litigation has value in many ways. While it has not yet procured water for the farm dwellers living in uMgungundlovu, the judgment establishes a process that hopefully should culminate in water services provision,

151 Interview with Mondli Zondi (n 9).

152 As above.

and in a uniform way that is not dependant on the whims of individual farm owners. It has also provided clarity on the legal obligations concerned. Nevertheless, the fact that the farm owners still wait for water, and the absence of any detailed engagement with the intermediary system, result in the conclusion that the value of the litigation in terms of both material and legal effect is present, but only partially. This is not the case in relation to political impact where there is a much stronger case for the value of the *Mshengu* litigation. Here the litigation has disrupted the pre-existing power relations by helping activists to be heard and to get taken seriously. It has also fostered intra-governmental cooperation.

A theme that repeatedly comes up is how the judgment provides clarity on who bears what obligation. It therefore is interesting that clarity is precisely the basis upon which the judgment can be critiqued. While the court cannot be faulted for its zeal in ensuring that the rights of farm dwellers are protected, the devil, as always, is in the detail. Specifically, the judgment appears to conflate the respective responsibilities of district and local municipalities in as far as they operate as water services authorities or not. This kind of boundary blurring may inhibit municipal action and should therefore be avoided.

Second, the judgment lays the obligation for water services provision on farms almost entirely at the door of local government, and thus misses an opportunity to engage with the intermediary system and how private resources can (legitimately in terms of both the broader constitutional framework and the regulatory system governing the right to water specifically) be deployed to further the fulfilment of constitutional rights. This probably is down to the way in which the case was framed by the applicants, which, as described above, resulted from some strategic trade-offs.

The right to water in section 27 of the Constitution, the intermediary system outlined in the Services Act, as well as any relevant provisions of existing municipal by-laws, weave a complex system for water services provision on privately-owned land. At the end of the day, a water services authority remains responsible for water services provision on farms, unless it has contracted a water services provider to do so, or unless an intermediary exists. If a farm owner is an intermediary by virtue of the contract that he has with his workers or labour tenants, then he may bear quite considerable obligations to provide water up to the standard set out in Regulation 3(b).

It is appropriate to conclude this discussion by allowing the activists who have worked to realise farm dwellers' rights to water to have the last word. AFRA have three key pieces of advice for others seeking to claim their water rights: Collating the facts and evidence to support claims is very important; litigation can be useful for many reasons but should always be a means of last resort used when other avenues have been exhausted; and one should spend time building relationships with everyone concerned. By the time the decision was taken to approach the court in this case, many of the municipalities and farm owners concerned supported this move as they understood the litigation as an attempt to get clarity for all of them, rather than as an attack.¹⁵³

Farm dwellers seeking to claim their water rights do well to engage with the municipality, even if that can be a frustrating and resource-intensive exercise. The truth is that municipalities may well share farm dwellers' frustration about how to ensure that water is provided on private land. If a contract exists such that the land owner is an intermediary, then farm dwellers and municipalities can work together to ensure that land owners fulfil their obligations. In turn, the municipality designated as a water services authority can also ensure that intermediaries have the financial support that may be necessary to make it all happen. If all the affected parties work together, the intermediary system thus has the potential to further the realisation of the right to water in South Africa.

153 As above.